IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-725

SOVEREIGN CONSTRUCTION COMPANY, LTD., *Petitioner*

v.

CITY OF PHILADELPHIA, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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INDEX

CITATIONS

Cases:

CITATIONS (*Continued*)

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OPINIONS BELOW

The opinion of the District Court (App. B of Petition) is reported at 439 F.Supp. 692 (E.D. Pa. 1977). The Court of Appeals for the Third Circuit affirmed without opinion. The judgment order of the Court of Appeals has been appended to the Petition as Appendix "A."

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

Does a private contractor have standing to pursue an action under Title II of the Federal Water Pollution Con-

trol Act Amendments of 1972, 33 U.S.C. §§1281-1293 (Supp. V 1975) where the only basis for jurisdiction alleged in its complaint is diversity of citizenship and where private contractors are not even arguably within the zone of interests protected by that title?

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Administrative Procedure Act, 5 U.S.C. §702 (1970), *as amended* by Act of October 21, 1976, Pub. L. No. 94-574, 90 Stat. 2721 and the Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500 (86 Stat. 816, 33 U.S.C. §1251 *et seq*) and the regulation involved (40 CFR 35.965) are set forth in the Appendix hereto.

STATEMENT OF THE CASE

On December 16, 1975, the Procurement Department of the City of Philadelphia, pursuant to its published invitation for public competitive bidding, received and opened nine (9) bids, including one submitted by plaintiff, on Bid No. 2497, for the general and mechanical work for the preliminary treatment building of the Northeast Water Pollution Control Plant. This project was to receive 75% funding from the Environmental Protection Agency, pursuant to Title II of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§1281-1293 (Supp. V 1975), while the remaining 25% of the project was to be funded from City sources. After full review of all bid documents, the City's Water Department determined two things: (1) that the apparent low bidder was Sovereign Construction Company; (2) that Sovereign's bid was unbalanced. From lengthy discussions with professional consultants, the Water Department was forced to conclude that the imbalance represented a serious and unwarranted

fiscal risk to the City. The Procurement Commissioner, based on his own review of all pertinent materials, independently reached the same conclusion, and on January 28, 1976, determined to reject all bids, readvertise, and hold another open competitive bidding.

Sovereign, having been notified of its rejection by the return of its bid security on February 5, 1976, requested through its attorney, that the EPA's regional administrator for Region III intervene. Upon hearing from EPA of the pending bid protest, the City, through its legal representative, the City Solicitor's Office, arranged for a meeting of the interested parties. On March 17, 1976, with representatives of the City's Water and Procurement Departments and the Solicitor's Office present, Sovereign was given the opportunity to express its views and the reasons for the City's decisions were explained. Following this meeting, the City again carefully reviewed all pertinent data. On April 19, 1976, the City's Procurement Commissioner notified the parties involved that the City's best interest required him to reject all bids and readvertise the project.

Thereafter, on April 19, 1976, Sovereign requested EPA's regional administrator to review the City's determination and a week later, the City moved for summary dismissal of the protest.

After a hearing on the matter, on December 6, 1976, the EPA at last issued its "Determination of Regional Administrator." After rejecting the City's arguments that Pennsylvania law rather than federal law should govern the dispute and that EPA's reliance on an EPA internal memorandum and substitution of its own judgment for that of the City clearly violated the grant regulations as well as State and local law, the Regional Administrator sustained Sovereign's protest and reversed the City's determination to reject all bids. On December 17, 1976, the City appealed the decision to the General Accounting Office pursuant to the GAO's opinion of September 12, 1975, 40 *Federal Register* 42406, concerning grant dispute jurisdiction. Before the GAO could rule on the matter, Sovereign

filed its Complaint on March 1, 1977, seeking the Court below to order that the disputed contract be awarded to it. The City then filed its Answer in response.

Thereafter, the City filed its Motion for Judgment on the Pleadings. Sovereign filed an Answer and Memorandum and Supplemental Memorandum and the City (with leave of the Court) filed a Supplemental Memorandum in answer thereto.

By opinion and order of October 31, 1977, the District Court granted the City's Motion. Although the City contended that Sovereign did not have standing to pursue this action, the Court concluded that Sovereign had no cause of action under either Pennsylvania or federal law and accordingly determined that it was unnecessary to reach the issue of "prudential" standing in this diversity case.

In relation to Sovereign's federal claim, the court noted that "Sovereign points to no specific regulation or statutory provision as the source of its federal causes of action, and, indeed has not invoked this Court's federal question jurisdiction," and further held that the Act did not provide an express right of action. Based upon an examination of the 1972 Amendments in light of *Cort v. Ash*, 422 U.S. 66 (1975), the Court held:

> I have concluded that no private right of action in a disappointed bidder may be implied from the Amendments.

The reasons given were that: (1) the 1,766 page legislative history was "utterly devoid of any indication that Congress enacted Title II of the Amendments for the *especial* benefit of private contractors;" (2) the absence of any reference to disappointed bidders in any of the broad provisions of the Amendments concerning rights of review indicated that Congress did not intend to create one; (3) the Congressional mandate respecting development of treatment works within the Amendment's "very rigorous timetable for pollution reduction" might well be frustrated were an additional avenue of review of bid decisions to be provided, in that such review could serve to delay construction while a disappointed bidder pursued his remedies through the courts; (4) state and municipal contracts have traditionally been governed by state law. On appeal the United States Court of Appeals for the Third Circuit affirmed "for the reasons set forth in the district court's opinion."

Although neither of the courts below addressed the issue of "prudential" standing, Sovereign apparently assumes that federal law is controlling on that question and further seeks to have this court determine its "standing to sue" thereunder (Petition, Question Presented). The lower court's determination that Sovereign does not have a federal cause of action is not challenged.

ARGUMENT

THE DECISION BELOW IS CLEARLY CORRECT

Since this case was brought in Federal Court solely on the basis of diversity of citizenship, the District Court was, in effect, sitting only as a court of Pennsylvania, and Pennsylvania law controls plaintiff's standing to pursue this action. *Pullman, Inc. v. Volpe*, 337 F. Supp. 432, 442 (E.D. Pa. 1971). See also *National Equipment Rental, Ltd. v. Reagin*, 338 F.2d 759, 762 (2nd Cir. 1964); *Erie R. Co. v. Tompkins*, 204 U.S. 64 (1938).

It is indisputably clear that a disappointed bidder does not have standing to sue in Pennsylvania where the relief sought is peculiar and individual to itself because a disappointed bidder has sustained no injury which entitles him to seek personal redress. *Comm. ex rel. Snyder v. Mitchell*, 82 Pa. 343 (1876).

The District Court could not have heard Sovereign's case on the merits. In *Highway Express Lines, Inc. v. Winter*, 414 Pa. 340, 200 A.2d 300 (1964), the Supreme Court of Pennsylvania affirmed the dismissal of separate equity actions instituted by the two low bidders after the City of Philadelphia had twice rejected all bids, stating:

> As disappointed and unsuccessful bidders, they have no standing to request the judicial award of a public contract. *Id.* at 346.

Moreover, the Court upheld the City's actions as within its "complete and plenary discretion to reject any and all bids in the City's best interests." *Id.* at 345.

Even assuming, arguendo, that federal-question jurisdiction had been invoked in Plaintiff's Complaint (it was not) and the question of standing is properly before this Court, Sovereign still has no standing under federal law to pursue its federal claim.

Preliminarily, it should be noted that the Regional Administrator's determination was favorable to Sovereign. Accordingly, Sovereign is not "[a] person suffering legal

wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute," 5 U.S.C. §702 (1970), *as amended* by Act of October 21, 1976, P.L. 94-574, 90 Stat. 2721 and it cannot rely on the Administrative Procedure Act (or the cases arising thereunder) as support on this issue. Furthermore, the facts of this case show that the EPA was not the party seeking bids for the Water Pollution Control Plant. The federal grant was made available to the City pursuant to Title II of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§1281-1293 (Supp. V 1975). Sovereign's injury, if any, derives from the allegedly unlawful conduct of the City in refusing it the contract. The EPA is in no way responsible for determination of the lowest responsible bidder, but was merely a source of revenue. *Shaw-Henderson, Inc. v. Schneider*, 335 F. Supp. 1203, 1212 (W.D. Mich. 1971) *aff'd* 453 F.2d 748 (6th Cir. 1971).

Turning to the issue of standing as developed by our courts, it is apparent that Sovereign has failed to demonstrate that the interest it seeks to protect is in any way within the zone of interests protected by the FWPCA. Section 1251(b) of the Act explicitly recognizes "the primary right and responsibility of the states in preventing and controlling water pollution;" the 1,766 page legislative history is conspicuously devoid of any reference to the rights of private contractors working on projects funded under Title II of the Act; and the sections specifically devoted to rights of review and citizens suits make no mention of bidding disputes.

The conclusion is inescapable that Congress intended to exclude the relation between a municipality and its contractors from coverage under the Act and leave that problem with the States, where it has traditionally resided. *Shaw-Henderson v. Schneider, supra*, fn. 1 at p. 213.

Finally, even assuming that the issue of standing was controlled by federal law and that the right of a private contractor in a bid dispute to seek the award of the contract is within the core of interests protected by the FWPCA,

Sovereign did not attempt to expressly state a federal cause of action. It did not point to any specific regulation or statutory provision as the source of its federal cause of action, it did not attempt to invoke federal-question jurisdiction and it does not now seek to have this Court review the determination of the court below that it failed to state a cause of action under federal law. Its sole claim to a federal cause of action rests on its assertion that the provisions of the Federal Water Pollution Control Act Amendments of 1972 Pub. L. No. 92-500, 86 Stat. 816, 33 U.S.C. §1251 *et seq.* should be enforced in its favor. Simply put, the Act does not contain an independent grant of subject matter jurisdiction.

In *Cort v. Ash*, 422 U.S. 66 (1975), this Court articulated the four factors relevant to a determination of whether a private remedy may be implied from a statute which, like the FWPCA, does not expressly grant one:

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted"—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law? *Id.* at 78 (citations omitted).

Applying the first factor, it is apparent that the protection of private contractors was not of congressional concern. As stated by the Court below:

> The 1,766 page legislative history is utterly devoid of any indication that Congress enacted Title II of the Amendments for the *especial* benefit of private contractors working on projects funded under that title.

> *See* Senate Comm. on Public works, Federal Water Pollution Control Act Amendments of 1971, S. Rep. No. 92-414, 92d Cong., 1st Sess. (1971); House Comm. on Public Works, Federal Water Pollution Control Act Amendments of 1972, H.R. Rep. No. 92-91, 92d Cong., 2d Sess. (1972)

The "Declaration of Goals and Policy," 33 U.S.C. §1251(a) instead recites that "[t]he objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." None of the national policy declarations that follow contain even a passing reference to private contractors.

Second, this Court in *Cort* held that where "it is at least dubious whether Congress intended to vest in the plaintiff class rights broader than those provided" by state law, the absence of any suggestion that the disputed provisions might give rise to a cause of action for damages is sufficient reason for concluding that they do not. *Id.* at 83-84. The FWPCA reveals a legislative intent to grant certain carefully delineated rights of review. (§§1319, 1365, 1369) and review of bid disputes is not included. To the contrary, Section 1251(b) of the Act cclearly states that the primary right and responsibility for eliminating pollution rests with the state and local governments and that the role of the federal government is to provide technical and financial support in connection therewith. Accordingly, the lower court correctly concluded:

> [T]he absence from the Amendments' broad provision on citizen suits of any colorable authorization for a private right of action in a disappointed bidder gives rise to an inference that Congress did not intend to create such a right.

Third, one of the stated purposes of the Act is to reduce paperwork and "to prevent needless duplication and unnecessary delay at all levels of government." 33 U.S.C. §1251(f). That purpose would undoubtedly be frustrated if an additional avenue of review were provided, in that construction of vital pollution control facilities might be

delayed indefinitely, while disappointed bidders on lucrative contracts (such as the one at bar) pursued their remedies through the federal courts.

Finally, disputes arising under state and municipal contracts have traditionally been relegated to state courts for determination in accordance with state law and the mere presence of federal dollars is an insufficient reason to create a federal right of action in an area of state concern, particularly after Congress has plainly stated its intent to recognize and preserve the primacy of state interest in that area. 33 U.S.C. §1251(b).

Accordingly, even were this Court, unlike the courts below, to determine the issue of standing in Sovereign's favor, Sovereign still does not have an actionable claim under federal law and the action of the district court in granting defendant's motion for judgment on the pleadings should be affirmed.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

James M. Penny, Jr.

Deputy City Solicitor
Counsel for Respondent

Date:

APPENDIX A

5 U.S.C. § 702 (1970), *as amended* by Act of Oct. 21, 1976, Pub. L. No. 94-574, 90 Stat. 2721 (Administrative Procedure Act)

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

Publ.L. 89-554, Sept. 6, 1966, 80 Stat. 392; Publ.L. 94-574, §1, Oct. 21, 1976, 90 Stat. 2721.

APPENDIX B

33 U.S.C. §§1251, 1319, 1365, 1369 (Federal Water Pollution Control Act Amendments of 1972)

SUBCHAPTER I—RESEARCH AND RELATED PROGRAMS

§ 1251. Congressional declaration of goals and policy

(a) The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter—

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State; and

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans.

(b) It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights

of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

(c) It is further the policy of Congress that the President, acting through the Secretary of State and such national and international organizations as he determines appropriate, shall take such action as may be necessary to insure that to the fullest extent possible all foreign countries shall take meaningful action for the prevention, reduction, and elimination of pollution in their waters and in international waters and for the achievement of goals regarding the elimination of discharge of pollutants and the improvement of water quality to at least the same extent as the United States does under its laws.

(d) Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency (hereinafter in this chapter called "Administrator") shall administer this chapter.

(e) Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes.

(f) It is the national policy that to the maximum extent possible the procedures utilized for implementing this chapter shall encourage the drastic minimization of paperwork and interagency decision procedures, and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government.

(g) It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this Act shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

June 30, 1948, c. 758, Title I, § 101, as added Oct. 18, 1972, Publ.L. 92-500, § 2, 86 Stat. 816, and amended Dec. 27, 1977, Publ.L. 95-217, § § 5(a), 26(b), 91 Stat. 1567, 1575.

§ 1319. Enforcement—State enforcement; compliance orders

(a) (1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any condition or limitation which implements section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title in a permit issued by a State under an approved permit program under section 1342 or 1344 of this title, he shall proceed under his authority in paragraph (3) of this subsection or he shall notify the person in alleged violation and such State of such finding. If beyond the thirtieth day after the Administrator's notification the State has not commenced appropriate enforcement action, the Administrator shall issue an order requiring such person to comply with such condition or limitation or shall

bring a civil action in accordance with subsection (b) of this section.

(2) Whenever, on the basis of information available to him, the Administrator finds that violations of permit conditions or limitations as set forth in paragraph (1) of this subsection are so widespread that such violations appear to result from a failure of the State to enforce such permit conditions or limitations effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the thirtieth day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such conditions and limitations (hereafter referred to in this section as the period of "federally assumed enforcement"), except where an extension has been granted under paragraph 5(B) of this subsection, the Administrator shall enforce any permit condition or limitation with respect to any person—

(A) by issuing an order to comply with such condition or limitation, or

(B) by bringing a civil action under subsection (b) of this section.

(3) Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by him or by a State or in a permit issued under section 1344 of this title by a State, he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.

(4) A copy of any order issued under this subsection shall be sent immediately by the Administrator to the State in which the violation occurs and other affected States. In

any case in which an order under this subsection (or notice to a violator under paragraph (1) of this subsection) is issued to a corporation, a copy of such order (or notice) shall be served on any appropriate corporate officers. An order issued under this subsection relating to a violation of section 1318 of this title shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation.

(5) (A) Any order issued under this subsection shall be by personal service, shall state with reasonable specificity the nature of the violation, and shall specify a time for compliance not to exceed thirty days in the case of a violation of an interim compliance schedule or operation and maintenance requirement and not to exceed a time the Administrator determines to be reasonable in the case of a violation of a final deadline, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.

(B) The Administrator may, if he determines (i) that any person who is a violator of, or any person who is otherwise not in compliance with, the time requirements under this chapter or in any permit issued under this chapter, has acted in good faith, and has made a commitment (in the form of contracts or other securities) of necessary resources to achieve compliance by the earliest possible date after July 1, 1977, but not later than April 1, 1979; (ii) that any extension under this provision will not result in the imposition of any additional controls on any other point or nonpoint source; (iii) that an application for a permit under section 1342 of this title was filed for such person prior to December 31, 1974; and (iv) that the facilities necessary for compliance with such requirements are under construction, grant an extension of the date referred to in section 1311(b)(1)(A) of this title to a date which will achieve compliance at the earliest time possible but not later than April 1, 1979.

(6) Whenever, on the basis of information available to him, the Administrator finds (A) that any person is in violation of section 1311(b)(1)(A) or (C) of this title, (B) that such person cannot meet the requirements for a time extension under section 1311(i)(2) of this title, and (C) that the most expeditious and appropriate means of compliance with this chapter by such person is to discharge into a publicly owned treatment works, then, upon request of such person, the Administrator may issue an order requiring such person to comply with this chapter at the earliest date practicable, but not later than July 1, 1983, by discharging into a publicly owned treatment works if such works concur with such order. Such order shall include a schedule of compliance.

Civil actions

(b) The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.

§ 1365. Citizen suits—Authorization; jurisdiction

(a) Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation

under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

Statutory or common law rights not restricted

(e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

Citizen

(g) For the purposes of this section the term "citizen" means a person or persons having an interest which is or may be adversely affected.

§ 1369. Administrative procedure and judicial review

(a) (1) For purposes of obtaining information under section 1315 of this title, or carrying out section 1367(e) of this title, the Administrator may issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and he may administer oaths. Except for effluent data, upon a showing satisfactory to the Administrator that such papers, books, documents, or information or particular part thereof, if made public, would divulge trade secrets or secret processes,

the Administrator shall consider such record, report, or information or particular portion thereof confidential in accordance with the purposes of section 1905 of Title 18, except that such paper, book, document, or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter, or when relevant in any proceeding under this chapter. Witnesses summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpena served upon any person under this subsection, the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Administrator, to appear and produce papers, books, and documents before the Administrator, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(2) The district courts of the United States are authorized, upon application by the Administrator, to issue subpenas for attendance and testimony of witnesses and the production of relevant papers, books, and documents, for purposes of obtaining information under section 1314(b) and (c) of this title. Any papers, books, documents, or other information or part thereof, obtained by reason of such a subpena shall be subject to the same requirements as are provided in paragraph (1) of this subsection.

(b) (1) Review of the Administrator's action (A) in promulgating any standard of performance under section 1316 of this title, (B) in making any determination pursuant to section 1316(b) (1) (C) of this title, (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title, (D) in making any determination as to a State permit

program submitted under section 1342(b) of this title, (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, or 1316 of this title, and (F) in issuing or denying any permit under section 1342 of this title, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon application by such person. Any such application shall be made within ninety days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such ninetieth day.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement.

(c) In any judicial proceeding brought under subsection (b) of this section in which review is sought of a determination under this chapter required to be made on the record after notice and opportunity for hearing, if any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, in such manner and upon such terms and conditions as the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination, with the return of such additional evidence. *June 30, 1948, c. 758, Title V, § 509, as added Oct. 18, 1972, Pub.L. 92–500, § 2, 86 Stat. 891, and amended Dec. 28, 1973, Pub.L. 93–207, § 1(6), 87 Stat. 906.*

APPENDIX C

40 CFR

"§ 35.965 *Enforcement.*

Noncompliance with the provisions of this subpart shall be cause for any one or more of the following sanctions, as determined appropriate by the Regional Administrator:

(a) The grant may be terminated or annulled pursuant to § 30.920 of this subchapter;

(b) Project costs directly related to the noncompliance may be disallowed;

(c) Payment otherwise due to the grantee of up to ten percent (10%) may be withheld (see § 30.615-3 of this subchapter);

(d) Project work may be suspended pursuant to § 30.915 of this subchapter;

(e) A noncomplying grantee may be found nonresponsible or ineligible for future Federal assistance or a noncomplying contractor may be found nonresponsible or ineligible for approval for future contract award under EPA grants,

(f) An injunction may be entered or other equitable relief afforded by a court of appropriate jurisdiction;

(g) Such other administrative or judicial action may be instituted as may be legally available and appropriate."